Guideline Sentencing Update

FEDERAL JUDICIAL CENTER

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Departures

CRIMINAL HISTORY

U.S. v. Hines, No. 92-30441 (9th Cir. June 20, 1994) (Trott, J.) (Remanded: It was proper to depart upward under §§ 5K2.0 and 4A1.3 for defendant's "extremely dangerous mental state"—evidenced by serious and repeated threats of future violence—and the resulting "significant likelihood that he will commit additional serious crimes." The case is distinguishable from *U.S. v. Doering*, 909 F.2d 392 (9th Cir. 1990), because the court did not base the departure on defendant's need for psychiatric treatment but on the "extraordinary danger to the community" he represented. And, because it was an extraordinary circumstance under § 5K2.0, the prohibition in § 5H1.3 did not preclude departure. However, although the district court may depart by offense levels since the departure was based on both §§ 5K2.0 and 4A1.3, it must explain why it chose three levels instead of one or two.).
Outline generally at VI.A.3.a and VI.B.1.i.

MITIGATING CIRCUMSTANCES

U.S. v. Walker, No. 93-50621 (9th Cir. June 21, 1994) (Farris, J.) (Affirmed: Agreeing with reasoning of *U.S. v. Harpst*, 949 F.2d 860, 863 (6th Cir. 1991) (Guidelines do not authorize downward departure on basis of suicidal tendencies), and holding that "post-arrest emotional trauma, or, what [defendant] refers to as 'self-inflicted punishment,' does not constitute a valid basis for departure.").
Outline at VI.C.1.b and i.

U.S. v. Amor, 24 F.3d 432 (2d Cir. 1994) (Affirmed: Downward departure for duress, § 5K2.12, was permissible for defendant convicted of three counts related to an illegal weapon and one count of retaliating against a witness. Defendant obtained the weapon after damage to his car and threats related to a labor dispute. The retaliation count arose from his repeated threats against a coworker who had informed police that defendant had the illegal weapon. The retaliation count had the highest offense level and thus controlled the guideline range under § 3D1.2's grouping rules. The government argued "(a) that 'offense' as used in § 5K2.12 should be interpreted as referring only to the offense that controlled a defendant's offense level for his entire group of offenses, (b) that Amor's controlling offense was the retaliation offense, and (c) that such duress as existed related only to the firearm offenses, not to the retaliation offense," thus making departure improper. The appellate court held that this was "too narrow a view of what it means for an offense to be committed 'because of' duress for the purposes of § 5K2.12. . . . The evidence was sufficient to support the finding that Amor had received a clear threat of physical injury and substantial property damage from the unlawful actions of unidentified parties. . . . [T]he relationship between the gun acquisition and the threats was close enough that it was fair for the court to conclude that there was a causal nexus between the original duress and the eventual threats of retaliation.").
Outline at VI.C.1.g.

NOTICE REQUIRED BEFORE DEPARTURE

U.S. v. Valentine, 21 F.3d 395 (11th Cir. 1994) (Remanded: Basing upward departure on ground raised for first time at sentencing hearing violated reasonable notice requirement of *Burns v. U.S.*, 111 S. Ct. 2182 (1991). "Contemporaneous—as opposed to advance—notice of a departure, at least in this case, is 'more a formality than a substantive benefit,' . . . and therefore is inherently unreasonable." Notice is required "to warn the defendant to marshal facts by which he may contest the evidence that ostensibly supports the proposed upward departure." Here, for example, the departure was "premised on several unsupported factual assumptions" that defendant was unaware of until the sentencing hearing. "If Valentine had been given notice that the district court was contemplating a departure on these 'facts,' he would have had notice and opportunity to argue against the court's mistaken factual conclusions; without such notice, this opportunity was lost.").
Outline at VI.G.

Offense Conduct

DRUG QUANTITY

U.S. v. de Velasquez, No. 93-1674 (2d Cir. June 22, 1994) (McLaughlin, J.) (Affirmed: For defendant who imported heroin by carrying it internally, it was proper to also include heroin hidden in her shoes that she claimed she did not know was there. "[I]n a possession case the sentence should be based on the total amount of drugs in the defendant's possession, without regard to foreseeability. . . . [A] defendant who knows she is carrying some quantity of illegal drugs should be sentenced for the full amount on her person."). See also *U.S. v. Imariagbe*, 999 F.2d 706, 707–08 (2d Cir. 1993) (defendant responsible for 850 grams of heroin imported in suitcase rather than 400 grams he claimed he believed he carried; and, while "one might hypothesize an unusual situation in which the gap between belief and actuality was so great as to [warrant] downward departure," that is not the case here); U.S.S.G. § 1B1.3, comment. (n.2) ("defendant is accountable for all quantities of contraband with which he was directly involved," and reasonable foreseeability "does not apply to conduct that the defendant personally undertakes").
Outline at II.A.1.

CALCULATING WEIGHT OF DRUGS—MARIJUANA

U.S. v. Stevens, 25 F.3d 318 (6th Cir. 1994) (Remanded: It was error to calculate marijuana distributor's offense level by using the number of plants his supplier grew rather than the weight of the marijuana distributed. The "equivalency provision" in § 2D1.1(c) at n.*, which treats each plant as the equivalent of one kilogram of marijuana when more than

one hundred plants are involved, should be applied "only to live marijuana plants found. Additional amounts for dry leaf marijuana that a defendant possesses—or marijuana sales that constitute 'relevant conduct' that has occurred in the past—are to be added based upon the actual weight of the marijuana and not based upon the number of plants from which the marijuana was derived.").
Outline at II.B.2.

More Than Minimal Planning

U.S. v. Kim, 23 F.3d 513 (D.C. Cir. 1994) (Affirmed: Section 2B1.1(b)(5) enhancement could not be applied to defendant's two acts of obtaining blank power of attorney forms—"'repeated acts' in the description of more than minimal planning contemplates at least three acts." *Accord U.S. v. Bridges,* – F.3d – (10th Cir. Mar. 17, 1994) ("repeated" means "more than two") [6 *GSU* #16]; *U.S. v. Maciaga,* 965 F.2d 404, 407 (7th Cir. 1992) (dicta indicating same). However, the enhancement was proper here because defendant twice obtained falsely notarized documentation, which may be considered as "significant affirmative steps . . . taken to conceal" his false bank loan applications.).
Outline at II.E.

Determining the Sentence

Consecutive or Concurrent Sentences

U.S. v. Quinones, 26 F.3d 213 (1st Cir. 1994) (Remanded: "[W]e hold that a sentencing court possesses the power to impose either concurrent or consecutive sentences in a multiple-count case. We also hold, however, that . . . a sentencing court's decision to abjure the standard concurrent sentence paradigm should be classified as, and must therefore meet the requirements of, a departure. It follows that a district court only possesses the power to deviate from the concurrent sentencing regime prescribed by section 5G1.2 if, and to the extent that, circumstances exist that warrant a departure.").
Outline at V.A.1.

Fines

U.S. v. Gomez, 24 F.3d 924 (7th Cir. 1994) (Affirmed: Although defendants "appeared to be penniless at the time of sentencing," fines could be imposed based on defendants' likely future wages in prison. Bureau of Prisons regulations "permit prisoners to keep half of their wages no matter what their obligations; the other half, however, is available for alimony, civil debts—and fines. 28 C.F.R. sec. 545.11(a)(3). Neither the text of the regulations nor any of defendants' arguments suggests that funds available to pay civil debts should be unavailable to pay criminal debts."). *Accord U.S. v. Tosca,* 18 F.3d 1352, 1355 (6th Cir. 1994) (indigent defendant "can make installment payments from prisoner pay earned under the Inmate Financial Responsibility Program").
Outline at V.E.1.

Adjustments

Obstruction of Justice

U.S. v. Johns, No. 92-1775 (2d Cir. June 13, 1994) (Jacobs, J.) (Remanded: During his presentence interview defendant denied involvement in any drug transactions other than those charged in his indictment. The district court held the denials were false and imposed a § 3C1.1 enhancement. "The government contends that these are not simply denials of guilt, but affirmative statements of materially false information. We conclude, however, that they do constitute 'denials of guilt' and therefore may not be deemed obstruction of justice . . . . There is no principled basis for distinguishing between laconic noes and the same lies expressed in full sentences. It is indisputable that [Application] Note 1 limits retribution for denials of guilt that are false; therefore, there can be no moral dimension to the matter of how that false denial may be framed. . . . Within the context of § 3C1.1, every denial of guilt will be materially false. Note 1 removes this sort of false statement from the ambit of the Guidelines provision. . . . The language of Note 1 is clear—absent perjury, a defendant may not suffer an increase in his sentence solely for refusing to implicate himself in illegal activity, irrespective of whether that refusal takes the form of silence or some affirmative statement denying his guilt.") (Altimari, J., dissented).
Outline at III.C.2.c and 5.

U.S. v. Vegas, No. 93-1375 (2d Cir. June 13, 1994) (Leval, J.) (Affirmed: Where jury apparently rejected defendant's "innocent explanation" by finding him guilty, the government argued that *U.S. v. Dunnigan,* 113 S.Ct. 1111 (1993), required the district court to make a finding as to whether defendant committed perjury and thereby merited a § 3C1.1 enhancement. The appellate court disagreed: "*Dunnigan* does not say that every time a defendant is found guilty despite his exculpatory testimony, the court must hold a hearing to determine whether or not the defendant committed perjury. On the contrary, that opinion clearly states that when the court wishes to impose the enhancement over the defendant's objection, the court 'must review the evidence and make independent findings necessary to establish a willful impediment to or obstruction of justice, or an attempt to do the same, under the perjury definition we have set out.' . . . *Dunnigan* does not suggest that the court make findings to support its decision against the enhancement.").
Outline at III.C.2.a and 5.

U.S. v. Woods, 24 F.3d 514 (3d Cir. 1994) (Remanded: Because § 3C1.1 "applies only when the defendant has made efforts to obstruct the investigation, prosecution, or sentencing of the offense of conviction," it may not be given to defendant who lied to FBI and grand jury about whether two friends participated in robbery that he was not convicted of. There was evidence defendant participated in that robbery, but he was not indicted for it and pled guilty to two other robberies. Departure is not proper either, because the Sentencing Commission "appears to have considered false statements like those involved here, and elected not to punish them as part of the conviction for the instant offense." The court added: "The result we reach is regrettable . . . [b]ut we are bound by the language of § 3C1.1 and its application notes.").
Outline at III.C.4.

Role in the Offense

U.S. v. Okoli, 20 F.3d 615 (5th Cir. 1994) (Affirmed: Nov. 1993 amendment clarifies that defendant need not personally lead five or more participants to receive § 3B1.1(a) enhancement; leading at least one of the five is sufficient. *See* § 3B1.1, comment. (n.2) ("To qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants.").
Outline at III.B.2.c.